

EXHIBIT D



U.S. Department of Justice


United States Marshals Service

Office of General Counsel

Washington, DC 20530-1000

December 12, 2012

MEMORANDUM TO: All United States Marshals
All Chief Deputy United States Marshals
All Associate Directors
All Assistant Directors

FROM:  Gerald M. Auerbach
General Counsel

SUBJECT: Booking Photograph Disclosure Policy

This guidance supersedes all prior memoranda regarding USMS policy with respect to the release of USMS booking photographs (mug shots) to the public or media.

Release for Law Enforcement Purposes. It is USMS policy to release photographs of fugitives or other prisoners only for law enforcement purposes. See 28 C.F.R. § 50.2(b)(7); USMS Directive 1.3, Public Affairs-Media § (D)(3)(e) & (D)(7)(c)(2). Such photographs generally reside in a system of records protected by the Privacy Act, 5 U.S.C. § 552a. Accordingly, such photographs may only be released to the media or public pursuant to a Privacy Act exception, such as the published routine use permitting releases that would not constitute an unwarranted invasion of personal privacy. See, e.g., System of Records Notice, Prisoner Processing and Population Management/Prisoner Tracking System ("PPM/PTS"), JUSTICE/USM-005, Routine Use (e), 72 Fed. Reg. 33515, 33520 (June 18, 2007). This requirement is met where a law enforcement purpose will be served by the release.

When a fugitive has not yet been captured, the Task Forces and district offices may determine whether a law enforcement purpose would be served by release of photographs to the media or public. See USMS Directive 1.3, Public Affairs-Media § (D)(7)(C)(2); 28 C.F.R. § 50.2(b)(8).

Once a prisoner has been arrested, the general rule is that no release should be made because release of photographs of that prisoner to the media or public would not serve law enforcement purposes. See USMS Directive 1.3, Public Affairs-Media § (D)(7)(c)(2) ("Do not release post-arrest booking photographs."). Nevertheless, there are certain post-arrest circumstances where public release of such photographs could serve a law enforcement function. See *id.* § (D)(3)(e) ("Post-arrest photographs of a prisoner will not be released to the news media unless a law enforcement purpose is served."). For example, photographs of arrested fugitives

may be disclosed for the purpose of informing the public that a particularly notorious fugitive, such as a fugitive on the USMS Fifteen Most Wanted list, has been apprehended. Furthermore, such a disclosure may be warranted to alert or encourage victims/witnesses to come forward for criminal proceedings. But at some point, after a certain period of time has elapsed or the case is closed, it would no longer be reasonable to conclude that release of an arrested fugitive's photograph serves any legitimate law enforcement function. *See id.* § (D)(7)(c)(1) ("Information concerning an investigation, arrest, release, prosecution, adjudication of charges, or correctional status is not to be disclosed if it is not currently relevant to the event.").

These factors are to be taken into consideration in determining which photographs of arrested fugitives may be released to the media or public following an arrest. The determination is left to the Task Forces and district offices with the assistance of the Office of Public Affairs and Office of General Counsel (OGC) as necessary. *See* USMS Directive 1.3, Public Affairs-Media § (D)(3)(e); *see also* USMS Directive 8.9, Fifteen Most Wanted Program/Major Cases.

Release in All Other Circumstances. When no specific law enforcement purpose would be served by the disclosure of a USMS booking photograph, public or media requests for such photographs must be handled under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. All such requests should be sent to the USMS OGC at usms.foia@usdoj.gov for processing in accordance with the FOIA. Booking photographs are generally not subject to *discretionary* release under the FOIA because they almost always reside in records systems protected by the Privacy Act. If the FOIA *requires* release, however, disclosure of the booking photographs would not violate the Privacy Act. *See* 5 U.S.C. § 552a(b)(2).

The USMS has consistently taken the position that booking photographs implicate personal privacy and should not be released under the FOIA unless a countervailing public interest is involved, i.e., the photographs somehow demonstrate something significant about the operations or activities of the government. *See* 5 U.S.C. § 552(b)(7)(C) (exempting records from release where "disclosure could reasonably be expected to constitute an unwarranted invasion of personal privacy"). This principle has recently been affirmed by two U.S. Courts of Appeals in decisions upholding USMS's refusal to release booking photographs in response to FOIA requests. *See World Publishing Co. v. Dep't of Justice*, 672 F.3d 825 (10th Cir. 2012); *Karantalis v. Dep't of Justice*, 635 F.3d 497 (11th Cir. 2011) (*per curiam*), *cert. denied*, 132 S. Ct. 1141, 2012 WL 171139 (U.S. Jan. 23, 2012). Until now, the USMS has employed an exception for FOIA requests originating within the jurisdiction of the U.S. Court of Appeals for the Sixth Circuit to accommodate that court's decision that "no privacy rights are implicated" by the booking photographs of a criminal defendant who has been publically named, who has "appeared in open court," and who has an "ongoing criminal proceeding." *See Detroit Free Press, Inc. v. Dep't of Justice*, 73 F.3d 93, 95, 97 (6th Cir. 1996) (declining to address whether a privacy interest exists in cases "involving dismissed charges, acquittals, or completed criminal proceedings").

In light of the weight of legal precedent now supporting the Department of Justice's conclusion that booking photographs generally should not be disclosed under the FOIA, the Department has decided that a uniform policy should be applied. Accordingly, effective immediately, the USMS will not disclose booking photographs under the FOIA, regardless of

where the FOIA request originated, unless USMS OGC determines either that the requester has made the requisite showing that the public interest in the requested booking photograph outweighs the privacy interest at stake or that other factors specific to the particular FOIA request warrant processing that request consistent with existing Sixth Circuit precedent.

If you have any questions, please contact Ed Bordley, Associate General Counsel and FOIA Officer, at (202) 307-8571 or Ed.Bordley@usdoj.gov.
